A

SHANTA HOLDINGS SDN BHD

v.

GOLDEN UNI-CONSORTIUM SDN BHD

B

COURT OF APPEAL, PUTRAJAYA
JAMES FOONG JCA
RAUS SHARIF JCA
ABDULL HAMID EMBONG JCA
[CIVIL APPEAL NO: S-02-868-2005]

C

23 AUGUST 2007

COMPANY LAW: *Shares - Acquisition - Application to acquire minority shares - Application filed before expiry of three months' notice under s. 180(3)(b) Companies Act 1965 - Whether application premature*

D

- Whether price per share offered reasonable

The respondent company acquired 90.1 % of the paid-up shares of a company called Aumkar Plantations Sdn Bhd ('the transferor company') at RM2.05 per share. The appellant company which held 9.9% of the paid-up shares of the transferor company was

E

not prepared to sell its shares at the price offered by the respondent but at a higher price of RM5.50 per share. After serving the appellant with a s. 180(3)(b) notice under the Companies Act 1965 ('the Act'), the respondent applied to the

F

High Court for a declaration to acquire the appellant's entire shareholding. The learned judge allowed the application. Hence, the appellant's appeal to this court. The appellant contended that the respondent's application to the court was premature as it was filed before the expiration of three months' notice provided by

G

s. 180(3)(b) of the Companies Act 1965. Also, the learned judge erred in concluding that the price of RM2.05 per share offered by the respondent was fair and reasonable.

Held (dismissing the appeal)
Per James Foong JCA delivering the judgment of the court:

H

(1) The maximum period of three months under s. 180(3) of the Act, is to enable the minority dissenting shareholder to give a counter notice requiring the transferee company to acquire its shares. This is in anticipation that the transferee company,

I

after acquiring the consenting majority shares, may refuse to acquire those of the dissenting minority. This provision is to

enable the dissenting minority shareholder to commit the transferee company to acquire its shares at the price accepted by the approving shareholders or if the minority shareholder is still dissatisfied with the price offered, then for the court to decide the fair price. (para 21)

(2) The facts showed that the respondent was not forced to acquire the appellant's shares after it had acquired the majority shares. The respondent was ready and willing to acquire them. On the appellant's part, the appellant was also prepared to part with the shares at a higher price. The technical objection raised by the appellant that the respondent should have delayed in filing its application was an attempt to get the respondent to buy the shares at the price per share insisted by the appellant. It served no purpose since the respondent was willing and ready to acquire the appellant's minority shares and left the issue of price to be decided by the court. (para 21)

(3) Whether the filing of the application was made before or after the appellant had given counter notice to the respondent made very little difference. The appellant was never prejudiced when the respondent's application was made before the receipt of the counter notice from the appellant. The appellant was still required to sell its shares to the respondent and was all along willing to do so except for the disagreement over the price per share. On the part of the respondent, the fact that it had filed the application was an indication that it was more than willing to acquire the appellant's share and was prepared to leave the issue of price to be determined by the court. (para 21)

(4) On the evidence adduced, the price of RM2.05 per share offered by the respondent was not unjust and manifestly lower than the value asked for by the appellant. Further, there were actual transactions of shares in the transferor company other than those between the respondent and the majority shareholders at the material time to reflect the actual consideration paid for the shares in the transferor company. That had an important bearing on the price of the shares. It gave a true reflection on the actual value of the shares transacted which led to the conclusion that the fair price for the appellant's shares was RM2.05 per share. (para 27)

A ***Bahasa Malaysia*** *Translation Of Headnotes*

Syarikat responden mengambil-alih 90.1 % saham berbayar sebuah syarikat yang dipanggil Aumkar Plantations Sdn Bhd ('syarikat pemindah') pada harga RM2.05 sesaham. Syarikat perayu, yang
B memegang 9.9% saham-saham berbayar syarikat pemindah tidak bersedia untuk menjual saham-sahamnya pada harga yang ditawarkan oleh responden tetapi akan menjual pada harga RM5.50 sesaham. Setelah menyerahkan notis s. 180(3)(b) di bawah Akta Syarikat 1965 ('Akta'), responden memohon ke
C Mahkamah Tinggi untuk deklarasi bagi mengambil-alih keseluruhan pegangan saham perayu. Yang Arif Hakim membenarkan permohonan. Oleh itu perayu merayu ke mahkamah ini. Perayu berhujah bahawa permohonan responden ke mahkamah adalah pra-
D matang kerana ia difailkan sebelum luputnya tempoh tiga bulan notis seperti yang diperuntukkan oleh s. 180(3)(b) Akta Syarikat 1965. Selain itu, Yang Arif Hakim silap dalam mendapati bahawa harga RM2.05 sesaham yang ditawarkan oleh responden adalah adil dan munasabah.

E **Diputuskan (menolak rayuan)**
Oleh James Foong HMR menyampaikan penghakiman mahkamah:

(1) Tempoh maksima tiga bulan di bawah s. 180(3) Akta, adalah bagi membolehkan pemegang saham minoriti yang menentang
F untuk memberi notis balasan meminta syarikat penerima pindahan untuk mengambil-alih saham-sahamnya. Ini adalah atas jangkaan bahawa syarikat penerima pindahan, setelah mengambil-alih saham-saham pihak majoriti yang bersetuju, mungkin menolak untuk mengambil-alih saham-saham pihak
G minoriti tersebut. Peruntukan ini adalah bagi membolehkan pihak minoriti yang menentang untuk mempastikan supaya syarikat penerima pindahan mengambil-alih saham-sahamnya pada harga yang diterima oleh pemegang-pemegang saham yang menyetujui, atau, jika pemegang saham minoriti masih
H tidak berpuas hati dengan harga yang ditawarkan, untuk mahkamah menentukan harga yang adil baginya.

(2) Fakta menunjukkan bahawa responden tidak dipaksa untuk mengambil-alih saham-saham perayu selepas ia mengambil-alih
I saham-saham pihak majoriti. Responden sentiasa bersedia untuk mengambil-alih saham-saham tersebut. Di pihak perayu, perayu juga bersedia untuk menjual saham-sahamnya pada

harga yang lebih tinggi. Bantahan teknikal yang dibangkitkan oleh perayu bahawa responden sepatutnya melengahkan pemfailan permohonannya adalah satu percubaan supaya responden membeli saham-saham pada harga lebih tinggi yang diminta perayu. Ia tidak bererti apa-apa oleh kerana responden sentiasa bersedia untuk mengambil-alih saham-saham minoriti perayu dan menyerahkan kepada mahkamah untuk memutuskan isu harga.

(3) Sama ada pemfailan permohonan dibuat sebelum atau selepas perayu memberi notis balasan kepada responden tidaklah penting sangat. Perayu tidak pernah diprejudis bilamana permohonan responden difailkan sebelum penerimaan notis balasan dari perayu. Perayu masih dikehendaki untuk menjual saham-sahamnya kepada responden dan sentiasa bersedia untuk berbuat demikian kecuali disebabkan oleh ketiadaan persetujuan mengenai harganya. Di pihak responden, fakta bahawa ia memfailkan permohonan menunjukkan bahawa ia amat bersedia untuk mengambil-alih saham-saham perayu dan bersedia untuk menyerahkan isu harga kepada mahkamah untuk pemutusan.

(4) Atas keterangan-keterangan yang dikemukakan, harga RM2.05 sesaham yang ditawarkan oleh responden tidak boleh dikatakan tidak patut dan terlalu rendah dari harga yang diminta perayu. Selain itu, terdapat transaksi-transaksi sebenar saham oleh syarikat pemindah selain dari yang berlaku di antara responden dan pemegang-pemegang saham majoriti pada waktu material yang mencerminkan balasan sebenar yang dibayar bagi saham-saham dalam syarikat pemindah. Ini mempunyai pengaruh yang kuat ke atas harga saham. Ia memberi gambaran yang tepat atas harga sebenar saham yang diurusniaga sekaligus membawa kepada rumusan bahawa harga patut saham-saham perayu adalah RM2.05 sesaham.

Case(s) referred to:
Re Hoare and Company Limited [1934] TLT 374 ***(refd)***
Re Sussex Brick Co, Ltd [1960] 1 All ER 772 ***(refd)***

Legislation referred to:
Companies Act 1965, s. 180(1), (3)(a), (b)

A *For the appellant - Ho Kin Kong (Rosslin P Rosen with him); M/s Ting, Rosen & Co*

For the respondent - Jeyan Marimuttu (Claudia A Lopez with him); M/s J Marimuttu & Partners

B *Reported by Usha Thiagarajah*

JUDGMENT

C **James Foong JCA:**

Introduction

[1] The facts of this case are substantially undisputed and are as follows:

D **[2]** At all material time, Aumkar Plantations Sdn Bhd (the transferor company) has or has had an authorized share capital of RM50,000,000 divided into 50,000,000 ordinary shares of RM1 each, of which 30,500,000 shares have been issued and fully paid up.

E **[3]** The 30,500,000 ordinary shares were held by 11 corporate entities, including the appellant who holds or has held 3,046,485 ordinary shares representing 9.9% in nominal value in the share capital of the transferor company.

F **[4]** On 10 January 2005, one Heinz Fochem on behalf of a consortium of European and American investors made an offer to all the shareholders of the transferor company to acquire their shares. The offer was as follows:

G (a) cash payment of RM2.05 per ordinary share of nominal value RM1.00 per share to those shareholders who wish to liquidate their shareholdings immediately on completion of legal share transfer formalities or;

H (b) for every 100 ordinary shares of par value RM1.00 per share held by Aumkar Plantations Sdn Bhd shareholders, these shareholders will receive in a new investment company, set up to acquire the total ordinary shares paid up capital of Aumkar Plantations Sdn Bhd the following:

I (i) Fully paid up 10 ordinary shares of par value RM1.00 per share, and

(ii) Fully paid up 200, 5% Redeemable Year 2008-2010 at par value, preference shares of par value RM1.00 per share. The preference shares will not carry any voting rights.

[5] On 21 February 2005, an extraordinary general meeting (EGM) of the shareholders of the transferor company was held in which the shareholders holding 90.1% of the shares voted in favour of accepting the offer. The appellant voted against it.

[6] Subsequent to this EGM, the appellant's solicitors, M/s Mahinder Singh Dulku & Co, wrote a letter to the transferor's company declaring that the appellant is prepared to accept the offer to purchase its shares at RM5.50 per share.

[7] On 14 February 2005, the respondent was incorporated under the Companies Act 1965 by the intending purchasers for the sole purpose of acquiring the whole of the paid-up shares in the transferor company.

[8] On 17 May 2005, the respondent entered into separate sale and purchase agreements with the approving shareholders for the sale and purchase of 27,453,515 of ordinary shares representing 90.1% in nominal value of those shares in the transferor company. And on 29 June 2005, the 27,453,515 ordinary shares were duly transferred to the respondent.

[9] On 30 June 2005 the respondent served on the appellant a notice, pursuant to s. 180(3) of the Companies Act 1965, notifying the appellant that they had acquired those shares which comprise of nine-tenths in nominal value of the ordinary shares in the transferor company and the appellant "may, within three months from the giving of this notice, give notice that you require the transferee company to acquire your holding of 3,046,485 Ordinary Shares in the transferor company, and if you give that notice the transferee company will be entitled and bound to acquire those shares on the terms on which under the scheme or contract the shares of the approving shareholders were transferred to it, or on such other terms as are agreed or as the High Court on application made to it by you or by the transferee company thinks fit to order".

[10] On 4 July 2005, the respondent took out originating summons bearing registration number T (24) 65 of 2005 in the High Court in Sabah and Sarawak at Tawau (the application and the subject matter of this appeal) with a returnable date of 26 July 2005. On 27 July 2005, the High Court allowed the respondent's application in the terms of the originating summons which declared that the respondent is entitled to acquire the appellant's entire shareholding as aforesaid. Dissatisfied with this decision, the appellant appealed to us.

Contentions Of The Appellant

[11] In this appeal, the appellant raised two contentions:

(1) The respondent's application was premature in that it was filed well before the three months accorded by s. 180(3)(b) of the Companies Act.

(2) The High Court has erred in concluding that the price of RM2.05 per share in the transferor company held by the appellant was not patently unfair and unreasonable.

[12] I shall deal with each of these in turn.

1st Issue: Is The Respondent's Application A Nullity For Reason That It Was Prematurely Filed?

[13] In order to appreciate this issue it is necessary to examine s. 180(3) of the Companies Act. It states:

> Where in pursuance of any such scheme or contract shares in a company are transferred to another company or its nominee and those shares together with any other shares in the first-mentioned company held by, or by a nominee for, the transferee company or its subsidiary at the date of the transfer comprise or include nine-tenths in nominal value of the shares in the first-mentioned company or of any class of those shares, then:
>
> (a) the transferee company shall within one month from the date of the transfer (unless on a previous transfer in pursuance of the scheme or contract it has already complied with this requirement) give notice of that fact in the prescribed manner to the holders of the remaining shares or of the remaining shares of that class who have not assented to the scheme or contract; and

(b) any such holder may within three months from the giving of the notice to him require the transferee company to acquire the shares in question,

and where a shareholder gives notice under paragraph (b) with respect to any shares, the transferee company shall be entitled and bound to acquire those shares on the terms on which under the scheme or contract the shares of the approving shareholders were transferred to it, or on such other terms as are agreed or as the Court on the application of either the transferee company or the shareholder thinks fit to order.

[14] It is contended by the appellant that by virtue of this provision, particularly sub-section (b), the appellant has up to three months to give a counter notice to the respondent before the respondent can make an application to the court for compulsory acquisition of the respondent's minority share in the transferor company. The notice date issued by the respondent under s. 180(3)(a) of the Companies Act was 30 June 2005, and the application of the respondent to the court was on 4 July 2005. According to the appellant, this was well before the expiration of three months for the appellant to give a counter notice to the respondent. In short, what the appellant is arguing is that the respondent's application to the court was premature and thus a nullity. The respondent should have waited until the appellant gives its counter notice to the respondent within three months before making the application.

[15] In the court below, the High Court Judge dealt with this matter in this manner:

There was also the equally unfounded argument that the application was premature in that it was filed well before the three months accorded by Section 180(3)(b) for the Defendant to exercise its statutory right, unnecessarily muddled as it was by an abstruse interpretation of that provision. In the light of the observations at pp 448-449 of the judgment of Wynn-Parry, J in *Re Western Manufacturing (Reading) Ltd* [1956] 1 Ch. 436 the argument must get very short shrift:

> In addition to the phrase which I have been considering, there are four somewhat similar periods mentioned in the section. First there is the phrase in sub-section (1): "within two months after the expiration of the "said four months." Secondly, there is the phrase, also in sub-section (1): "Within one month from then date on which the "notice

A was given." Thirdly, there is the phrase in subsection (2)(a): "within one month of the date of transfer"; and fourthly, the phrase in subsection (2)(b): "within three months "from the giving of the notice." Now, it will be observed that in the case of each of those four phrases the period is the maximum period during any moment of which the event contemplated may occur. In the light of this it would be odd indeed if the first phrase of all had to be construed in a different sense, namely, as describing a fixed period until the expiration of which one must wait in order to see whether the event contemplated has or has not occurred.

[16] Contending that the learned High Court Judge has erred in his view on this issue, the appellant highlighted to us that the case cited *Re Western Manufacturing (Reading) Ltd (supra)* is in respect to a provision in the English Companies Act which is equivalent to s. 180(1) of our Companies Act. What concerns us here is s. 180(3) of the Companies Act, particularly sub-section (b). Section 180(3) of the Companies Act requires different treatment from that of s. 180(1) of the Companies Act since it caters for a different situation in the compulsory acquisition of minority shares holders in a transferor company by a transferee company.

[17] To understand this, it is necessary to first examine s. 180(1) of the Companies Act. It is:

Where a scheme or contract involving the transfer of all of the shares or all of the shares in any particular class in a company (in this section referred to as the "transferor company") to another company or corporation (in this section referred to as the "transferee company") has within four months after the making of the offer in that behalf by the transferee company been approved as to the shares or as to each class of shares whose transfer is involved by the holders of not less than nine-tenths in nominal value of those shares or of the shares of that class (other than shares already held at the date of the offer by, or by a nominee for, the transferee company or its subsidiary), the transferee company may at any time within two months after the offer has been so approved give notice in the prescribed manner to any dissenting shareholder that it desires to acquire his shares and when such a notice is given the transferee company shall, unless on an application made by the dissenting shareholder within one month from the date on which the notice was given or within seven days of a statement being supplied to a dissenting shareholder pursuant to subsection (2) (whichever is the later) the

> Court thinks fit to order otherwise, be entitled and bound to acquire those shares on the terms which, under the scheme or contract the shares of the approving shareholders are to be transferred to the transferee company or if the offer contained two or more alternative sets of terms upon the terms which were specified in the offer as being applicable to dissenting share holders.

[18] One will observe that this provision covers the initial period where there is an offer to purchase the entire shareholdings of the transferor company and the majority of the consenting shareholders, equivalent to nine-tenth in total value of the transferor company, have yet to transfer their respective shares to the transferee company. This is unlike the situation in s. 180(3) of the Companies Act, where the shares of the consenting majority shareholders, equivalent to nine-tenth in total value of the transferor company, had already transferred their shares to the transferee company.

[19] Now we look at the facts in *Re Western Manufacturing (Reading) Ltd (supra)*. The head note of this case reports that:

> On February 11, 1955, W. Ltd. issued to its shareholders a circular announcing a scheme for its amalgamation with A. Ltd. whereby A. Ltd. would acquire the shares in W. Ltd. The circular provided that the offer was conditional on being accepted on or before March 4, 1955, or such later date as might be agreed between the two boards, in respect of not less than 90 per cent of the issued shares of W. Ltd. By agreement the date for acceptance was extended and, in the result, the holders of over nine-tenths in value of the shares in W. Ltd. accepted the offer. The applicant on this summons held 3,585 shares out of 2,131,104, and in due course A. Ltd. served on him, pursuant to section 209(1) of the Companies Act, 1948, a notice that it desired to acquire his shares on the terms of the offer contained in the circular. By this summons, issued in July, 1955, he asked for an order, pursuant to the subsection, that A. Ltd. was not entitled to acquire his shares in W. Ltd., or any of the shares therein, on the terms of the scheme or contract dated February 11, 1955, notwithstanding that the same had been approved by the holders of nine-tenths in value of the shares whereof the transfer was involved. For the applicant it was contended that the offer had to remain open for four months and that it was issued on February 11, 1955, and itself expressly provided that it must be accepted by March 4, 1955.

[20] And it was held:

> in deciding that the notice to the applicant was valid and dismissing the summons: that, in section 209(1), the phrase "within four months after the making of the offer" did not denote a fixed period during the whole of which the offer must remain open, but described a maximum period during which the event contemplated might occur; and that it was competent to A. Ltd. to fix a period within, but shorter than, the four months, during which the offer must be accepted.

[21] I agree that the judgment in the aforesaid case deals with a provision which is rather similar to s. 180(1) of our Companies Act. Nevertheless, the interpretation on the period of time should equally apply to s. 180(3) of the Companies Act. It is the maximum period during any moment of which the event contemplated may occur. And under s. 180(3) of the Companies Act, the maximum period is three months for the minority dissenting shareholder to give a counter notice requiring the transferee company to acquire its minority shares. This is in anticipation that the transferee company, after acquiring the consenting majority shares, may refuse to acquire those of the dissenting minority. This provision is to enable the dissenting minority shareholder to commit the transferee company to acquire its shares at the price accepted by the approving shareholders or if the minority shareholder is still dissatisfied with the price as offered, then for the court to decide what is the fair price. In this instance, the transferee company desired to acquire the shares of the minority shareholders. This is not a case where the transferee company had to be forced upon to acquire these shares after it has acquired the shares of the majority. In short, the respondent here was ready and willing to acquire the appellant's shares. On the part of the appellant, the appellant was also prepared to part with its shares except at a higher price, which of course will be settled by the court when there is a disagreement over it. This willingness of the appellant for the respondent to acquire its shares is reflected in the appellant's solicitor's letter to the transferor company on 9 March 2005 where it asked for RM5.50 per share. This was subsequently reaffirmed by the appellant when the appellant gave a counter notice to the respondent to acquire its shares. Though this was given without prejudice to this appeal and subsequent to the application of the respondent but before the

expiry of the three month period mentioned in s. 180(b) Companies Act, the fact remains that the appellant was desirous of the respondent to acquire its shares. These, in my opinion, clearly imply that the appellant had from the very beginning to the end of the three month period after the notice by the respondent under s. 180(3)(a) of the Companies Act, intended and had notified the respondent to acquire its minority shares in the transferor company. The technical objection now raised by the appellant that the respondent should have delayed in filing its application is, to my mind, an attempt to extract from the respondent the price insisted on by the appellant for its shares. It serves no purpose since the respondent was willing and ready to acquire the appellant's minority shares and to leave the price of the shares to be decided by the court. So in this case, whether the filing of the application was before or after the appellant had given counter notice to the respondent makes very little difference. The appellant was never prejudiced when the respondent's application was made before the receipt of the counter notice from the appellant. The appellant was still required to sell its shares to the respondent and in this case, had all along been willing to do so except for the price which, as I have repeatedly said, could be settled by the court when it was not agreed upon. On the part of the respondent, the fact that it has filed this application is an indication that it was more than willing to acquire the appellant's share and was prepared to leave the issue of price to be determined by the court. Under such circumstances, this objection of the appellant must be overruled.

2nd Issue: Has The Trial Judge Erred In Concluding That The Price Of RM2.05 Per Share In The Transferor Company Held By The Appellant Patently Unfair And Unreasonable?

[22] Under s. 180(3) of the Companies Act, it is stated that after the appellant has given notice to acquire its shares, the respondent "shall be entitled and bound to acquire those shares on the terms on which under the scheme or contract the shares of the approving shareholders were transferred to it, or on such other terms as are agreed or as the court on the application of either the transferee company or the shareholder thinks fit to order".

[23] As there was a difference between the amount offered by the respondent (RM2.05 per share) and the demand by the appellant (RM5.50 per share) the learned trial judge decided, following a line of English authorities relating to such matter, that

A It may well be that the Defendant's method of valuation is better and that its criticism of the offer is not totally unjustified or it may even be it is manifest that a higher value ought to have been given to the shares but in the absence of any suggestion that the Plaintiff is acting in bad faith in the sense that its objective is for some sinister purpose obtained by devious means, the Defendant B has not established that the offer is unfair.

[24] The offer by the respondent and the demand by the appellant are not arrived at without consultant's opinion. On the side of the respondent, there is the share valuation report (AAG C Report) by M/s Ahmad Abdullah & Goh (AAG), a firm of Chartered Accountants. This report came about after the transferor company held its 2004 Annual General Meeting where a shareholder desired to dispose off his entire shareholdings. It was then agreed that AAG be appointed to evaluate the shares to be D sold. AAG Report states that the price ranges between RM1.21 to RM1.38. The AAG Report was then given to M/s KPMG (KPMG) a firm of Chartered Accountants based in Sandakan, Sabah. KPMG came up with a draft report (KPMG draft report) to say that by their methodology in calculating share value of the E transferor company which is based on a 'break up' value basis, the value per share is RM3.34. There is no final report from KPMG. The KPMG report was then forwarded to AAG who commented on a number of shortcomings in the manner KPMG arrived at its conclusion. Subsequent to the 2004 Annual General F Meeting of the transferor company, certain shares in the company were transacted. They ranged between RM1.00 per share to RM2.05 per share. There was an attempt to resolve the difference between the price demanded by the appellant and that offered by the respondent by appointing an independent Chartered G Accountant recommended by the Malaysian Institute of Accountants to determine the fair value of the appellant's minority shares. But this fell through when the appellant insisted on appointing an independent auditor nominated by the respondent and agreed to by the transferor company and whatever value H determined by this valuer would be sale price of the appellant's shares. The transferor company however maintained its original position.

[25] With this impasse, each party in this action traded different I views and angles in analyzing their respective valuation reports to support their cause. Faced with this, I agree with the approach of the learned trial judge who insisted that unless there is evidence

advanced by the appellant to show that the price offered and accepted by the majority of the shareholders who make up of nine-tenths of the total value of the shares is totally unjustified or is manifestly lower than the value asked for by the respondent or that the respondent was acting in bad faith in the sense that its objective is for some sinister purpose obtained by devious means, then the price for the appellant's share should be that as offered and accepted by the majority shareholders who consented. This approach is not without support. In *Re Hoare and Company Limited* [1934] TLT 374, Justice Maugham has this to say:

> The other conclusion I draw is this, that again *prima facie* the court ought to regard the scheme as a fair one inasmuch as it seems to me impossible to suppose that the court, in the absence of very strong grounds, is to be entitled to set up its own view of the fairness of the scheme in opposition to so very large a majority of the shareholders who are concerned. Accordingly, without expressing a final opinion on the matter, because there may be special circumstances in special cases, I am unable to see that I have any right to order otherwise in such a case as I have before me, unless it is affirmatively established that, notwithstanding the views of a very large majority of shareholders, the scheme is unfair.

[26] The other case is *Re Sussex Brick Co., Ltd.* [1960] 1 All ER 772 @ 774 where Vaisey J declared:

> I think that the scheme must be obviously unfair, patently unfair, unfair to the meanest intelligence. I do not think that merely finding items in the scheme or details of the scheme which are open to valid criticism is enough. A scheme can be effective to bind a dissenting shareholder without complying to the extent of one hundred per cent with the highest possible standards of fairness, equity and reason.

[27] In this case, the learned trial judge has correctly observed that on the evidence as presented, the price of RM2.05 per share offered by the respondent is not totally unjust and manifestly lower than the value asked for by the appellant. Though the appellant's claim is supported by the KPMG draft report which questioned the AAG Report, nevertheless the subsequent clarification by AAG had provided reasonable explanation to the queries raised. Further, there were actual transactions of shares in the transferor company other than those between the respondent and majority approving shareholders at the material time to reflect the actual consideration

paid for the shares in the transferor company. This has an important bearing on the price of the shares. It gives a true reflection of the actual value of the shares transacted. This leads me to share the same conclusion as the learned trial judge that the fair price for the appellant's shares is RM2.05 per share.

Conclusion

[28] In conclusion, this appeal is dismissed with costs. My brothers Justice Md. Raus Sharif and Justice Abdull Hamid Embong have read this judgment in draft and concurred with the contents therein.